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CONSTRUCTIVE TRUSTS BASED ON PROMISES MADE TO SECURE BEQUESTS, DEVISES, OR INTESTATE SUCCESSION

[Continued]

B. THE AUTHORITIES

WHERE the existence of unattested directions by testator is not communicated to the legatee or devisee in the testator's lifetime. — It is perfectly clear that where a legatee or devisee takes by the terms of the will absolutely, but a document not attested as a will, and not incorporated into the will, is found with the will, or in some other way is brought to the attention of the legatee or devisee for the first time after the testator's death, and discloses the intention of the testator that the devisee or legatee should not hold absolutely but in trust, chancery will not make the legatee or devisee hold as trustee.⁵⁶ "Such a memorandum may or may not influence him as a man of honor, but no legal effect can be given to it."⁵⁷ The legatee or devisee could not be made to hold in trust

⁵⁶ Schultz's Appeal, 80 Pa. St. 396 (1876); *Juniper v. Batchelor*, [1868] W. N. 197; Ames, *Cases on Trusts*, 2 ed., 189. See *Scott v. Brownrigg*, 9 L. R. Ir. 246 (1881); *In re Boyes*, L. R. 26 Ch. D. 531 (1884); *Bryan v. Bigelow*, 77 Conn. 604, 60 Atl. 266 (1905). Cf. *Hodnett's Estate*, 154 Pa. St. 485, 26 Atl. 623 (1893); *Flood v. Ryan*, 220 Pa. St. 450, 69 Atl. 908 (1908).

But in *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614 (1892), where a bequest was made to a stranger with intent on the testator's part to evade the state bastardy statute by having the stranger hold for testator's mistress and bastard children more property than the statute permitted him to give them as against his wife and lawful children, it was held that the stranger must hold in trust for the wife and lawful children, despite the fact that he was not informed before testator's death of any secret trust attached to the bequest. Pope, J., for the court, said of the legatee (p. 550):

"If he should disregard this palpable intention of his benefactor, he would be lost to all shame. If he should regard it and execute it, he thus contravenes the positive laws of his country forbidding such a course. Under our view of the law, he shall not be required to elect either course."

Schultz's Appeal, *supra*, which is *contra*, seems a sounder decision. It allowed the legatee to keep free from any trust as he was "entirely innocent of any complicity in the fraud of the testator."

⁵⁷ Cozens-Hardy, L. J., in *In re Maddock*, [1902] 2 Ch. 220, 230. Cf. *Flood v. Ryan*, *supra*.

for the intended *cestui que trust*, because the statute governing wills makes it impossible to ascertain against the objection of the legatee or devisee, by competent evidence, who he is, since to let the document name him would be to give it, though unattested as required of wills, the effect of a will; and the legatee or devisee could not be held to be a trustee for the next of kin, residuary legatee, heir, or residuary devisee, without a finding that he was intended to be trustee, and the statute governing wills makes that finding impossible, against his objection, for want of competent evidence of such intent. Since he has taken in ignorance of the testator's intentions, and since those intentions have not been evidenced in the manner required by the statute about wills, chancery says that he may do as he pleases with the legacy or devise.⁵⁸

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are not communicated to him in the testator's lifetime. — It is also well settled that a legatee or devisee, who by the provisions of the will is to take absolutely, cannot be compelled to hold in trust for intended *cestuis que trust* merely because he promised the testator that he would hold for the benefit of persons to be named later by the testator. A document signed by the testator and containing the names of the persons and the terms of the secret trust, but not attested as a will and not communicated to the legatee or devisee in the testator's lifetime, cannot be enforced as a document without violating the statute governing wills.⁵⁹ But that does not mean that the legatee or devisee may hold for himself free from any trust. Since he agreed to take only as trustee, and thereby either induced the making of the devise or legacy to himself or, if the will containing it was already in existence at the time of the promise, secured its continuance without revocation or qualification, he cannot on principle be allowed to hold for

⁵⁸ In *In re Pitt Rivers*, [1902] 1 Ch. 403, Vaughan Williams, L. J., said (p. 407):

"It has been discussed very often what are the essentials which are necessary in order to induce the courts to give effect to a trust which has not been expressed in the way in which the Wills Act requires that testamentary intentions should be expressed. . . . I suppose one may state shortly and concisely that the court never gives the go-by, if I may use the expression, to the provisions of the Wills Act by enforcing upon any one testamentary intentions which have not been expressed in the shape and form required by that Act, except for the prevention of fraud. That is the only ground upon which it can be done."

⁵⁹ *In re Boyes*, *supra*. Cf. *McCormick v. Grogan*, L. R. 4 H. L. 82 (1869); *In re King's Estate*, L. R. 21 Ir. Ch. 273 (1888).

himself, for that would be unjust enrichment such as equity cannot properly tolerate. While chancery could make him hold for the intended *cestui que trust*, since chancery, if it wants to, can select as its constructive *cestui que trust* anyone who ought to fill that position, the chancellors have so far felt that to select the intended *cestui que trust* in this kind of a case would be to go contrary to the intent of the statute governing wills. Accordingly, in most jurisdictions, the legatee or devisee will be made to hold in trust for the next of kin, residuary legatee, heir, or residuary devisee.⁶⁰ In some jurisdictions, however, he will be allowed to keep for himself, if he did not solicit the legacy or devise, if he made his promise in good faith, and if his action is not in violation of a special confidential relationship.⁶¹ It would seem that since he is compelled to hold in trust for anybody only because he promised as he did, and because he cannot be allowed to be enriched by a breach of that promise, he should be allowed to hold for the intended *cestuis que trust* if he so prefers. This view does not ignore the policy of the statute regarding wills, but recognizes the truth that there can properly be no constructive trust at all if the legatee or devisee carries out the testator's wishes, for he is then not unjustly or at all enriched.⁶² It is quite sound to say that the legatee or de-

⁶⁰ *In re Boyes, supra*. Cf. *Thayer v. Wellington*, 9 Allen (Mass.) 283 (1864). Such a trust has usually been applied by testators to the whole estate, or to the residue, and hence there has been no chance for a residuary legatee to claim against the next of kin or for a residuary devisee to claim against the heir. The wording of the residuary clause, and the attitude of the given jurisdictions on lapsed and void legacies and devises, would be factors in determining any conflicting claims. That the residuary legatee or devisee must be reckoned with when a proper occasion arises is recognized in the sentence from *Jarman on Wills*, quoted in n. 91, *post*.

⁶¹ See cases in n. 68, *post*.

⁶² See n. 42, 43, and 45, *ante*. No court seems yet to have taken such advanced ground, but in reference to an analogous supposititious situation, — that of a devise expressly "in trust" but the trust not being stated in the will and not being communicated to the trustee in the testator's lifetime, — an English judge has recently stated that apart from authority he sees no reason why a trust for the intended *cestui que trust* should not be enforced if the testator communicated his intentions to some one. See Eve J., in *In re Gardom, Le Page v. Attorney-General*, [1914] 1 Ch. 662, 672-3. His statement in regard to that point will be found quoted in n. 90, *post*. The argument is that communication to the devisee is needed only to establish that he is to hold in trust for some one, a fact which in the expressly "in trust" cases the will itself establishes, and that communication by the testator to any one will serve to designate the *cestui que trust*, *i. e.*, to show "what the trust is." A letter of the testator to the devisee found among the testator's papers, as was the case in

visée cannot be forced to carry out the uncommunicated wishes of the testator not attested as required by the statute as to wills, since to force him to do so would be to give those uncommunicated wishes the operative effect of a will. But it would seem to be just as sound to say that he should be allowed to carry out those wishes if he wants to, since nothing but his refusal or neglect to carry them out would justify the enforcement of a constructive trust against him in favor of anybody.

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are communicated to him in the testator's lifetime and the promise induces the giving of the legacy or devise. — By the great weight of authority a constructive trust will be declared and enforced against a legatee or devisee, and in favor of the intended *cestui que trust*, if the testator gave the legacy or devise because of the legatee's or devisee's express or tacit promise to use the legacy or devise for the intended beneficiaries, provided the testator's intentions are legal and the names of the beneficiaries are communicated to the legatee or devisee by the testator in his lifetime.⁶³ The minority decisions are discussed under the second

In re Boyes, supra, would serve the same purpose. But in the absence of communication to him in the testator's lifetime, the devisee should not be compelled to hold in trust for the intended *cestui que trust*, but he should be permitted to hold for the intended *cestui que trust* if he desires to do so.

⁶³ *Drakeford v. Wilks*, 3 Atk. 539 (1747); *Thynn v. Thynn*, 1 Vern. 295 (1864); *In re Fleetwood*, L. R. 15 Ch. D. 594 (1880); *O'Brien v. Tyssen*, L. R. 28 Ch. D. 372 (1884); *Sharry v. Garty*, 2 Ir. Ch. Rep. 351 (1850); *O'Brien v. Condon*, [1905] 1 Ir. R. 51; *Buckingham v. Clark*, 61 Conn. 204, 23 Atl. 1085 (1891); *Caldwell v. Caldwell*, 7 Bush (Ky.) 515 (1870); *Chapman's Ex'r v. Chapman*, 152 Ky. 344, 153 S. W. 434 (1913); *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464 (1888); *Owings' Case*, 1 Bland (Md.) 370 (1826); *Olliffe v. Wells*, 130 Mass. 221 (1881) (*semble*); *Ham v. Twombly*, 181 Mass. 170, 63 N. E. 336 (1902) (*semble*); *Hooker v. Axford*, 33 Mich. 454 (1876); *Benbrook v. Yancy*, 96 Miss. 536, 51 So. 461 (1910); *Smullin v. Wharton*, 73 Neb. 667, 103 N. W. 288 (1905); *Williams v. Vreeland*, 29 N. J. Eq. 417 (1878), 32 N. J. Eq. 135, 734 (1880); *Yearance v. Powell*, 55 N. J. Eq. 577, 37 Atl. 735 (1897) (see *Powell v. Yearance*, 73 N. J. Eq. 117, 67 Atl. 892 (1907)); *O'Hara v. Dudley*, 95 N. Y. 403 (1884); *Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876 (1897); *Edson v. Bartow*, 154 N. Y. 199, 48 N. E. 541 (1897); *Peters v. Peters*, 122 N. Y. Supp. 363 (1910); *Golland v. Golland*, 84 N. Y. Misc. 299, 147 N. Y. Supp. 263 (1914); *Winder v. Scholey*, 83 O. St. 204, 93 N. E. 1098 (1910); *Vance v. Park*, 8 O. C. D. 425 (1898); *Hoge v. Hoge*, 1 Watts (Pa.) 163 (1832); *Jones v. McKee*, 3 Pa. St. 496 (1846); *McKee v. Jones*, 6 Pa. St. 425 (1847); *Church v. Ruland*, 64 Pa. St. 432 (1870); *Socher's Appeal*, 104 Pa. St. 609 (1883); *Blick v. Cockins*, 234 Pa. St. 261, 83 Atl. 196 (1912); *Rutledge v. Smith*, 1 McCord Ch. (S. C.) 119 (1825); *Towles v. Burton*, Rich. Eq. Cas. (S. C.) 146 (1831); *McLellan v. McLean*, 2 Head (Tenn.)

heading *post* in regard to active solicitation, etc. When a trust is enforced it is not the express trust, but a constructive trust to

684 (1859); *Stone v. Manning*, 103 Tenn. 232, 52 S. W. 990 (1899); *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143 (1892). *Cf.* *Podmore v. Gunning*, 7 Sim. 644 (1836); *In re Pitt Rivers*, *supra*; *Mead v. Robertson*, 131 Mo. App. 185, 110 S. W. 1095 (1908); *Aumack v. Jackson*, 79 N. J. Eq. 599, 82 Atl. 896 (1912). But see *Moore v. Campbell*, 102 Ala. 445, 14 So. 780 (1893), limited to devises and not applied to bequests in *Moore v. Campbell*, 113 Ala. 587, 21 So. 353 (1896).

For the minority cases, see n. 68, *post*.

That the Indiana rule is the same as the majority view has been doubted in view of *Orth v. Orth*, 145 Ind. 184, 42 N. E. 277 (1896) (see Ames, *Lectures on Legal History*, 430 n.), but the case of *Ransdel v. Moore*, 153 Ind. 393, 53 N. E. 767 (1899) (see *Moore v. Ransdel*, 156 Ind. 658, 59 N. E. 936 (1901)), although a deed case instead of a will case, and although an instance of the prevention of a deed rather than the securing of a deed, makes it reasonably certain that the Indiana rule will be declared in accord with the majority view. In *Ransdel v. Moore* the intending grantor was on her deathbed and the court regarded the case as in effect one of prevention of a will. *Cf.* *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 666 (1902), where a dying grantor gave a deed on an oral trust, and a trust was enforced for the intended *cestui* on the will theory. A similar case is *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679 (1903).

In many of the other deed on oral trust cases the fact that the grantor was dying or acted in contemplation of death, and but for the resort to a deed would have made a will, seems to have influenced the courts to find the breach of a special confidential relationship, or to presume fraud, as a basis for a constructive trust. See, for example, *Fisk's Appeal*, 81 Conn. 433, 71 Atl. 559 (1908); *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 116 (1892); *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58 (1906); *Newis v. Topfer*, 121 Ia. 433, 96 N. W. 905 (1903); *Scheringer v. Scheringer*, 81 Neb. 661, 116 N. W. 491 (1903). *Cf.* *Devemish v. Barnes*, Prec. Ch. 3 (1869); *McDowell v. McDowell*, 141 Ia. 286, 119 N. W. 702 (1909).

For cases where it is not clear whether the promise was before or after the making of the will, but a trust was enforced, see *Nab v. Nab*, 10 Mod. 404 (1717); *Oldham v. Litchfield*, 2 Vern. 506 (1705); *French v. French*, [1902] 1 Ir. R. 172; *Shields v. McAuley*, 37 Fed. 302 (1888); *Hughes v. Bent*, 118 Ky. 609, 81 S. W. 931 (1904); *McAuley's Estate*, 184 Pa. St. 124, 39 Atl. 31 (1897); *Washington's Estate*, 220 Pa. St. 204, 69 Atl. 747 (1908).

In *Bennett v. Harper*, *supra*, a testator made a will leaving his home place to one of his daughters, after telling her husband that it was on condition that the husband should deed to another daughter a 600-acre tract of land which the testator had deeded to the husband some years before, and after being led to believe, by the husband's failure to object, that he acquiesced. The court declared a lien on the 600-acre tract in favor of the intended beneficiary "to the amount of the value of the 600-acre tract" with interest from the date of the suit and with an option on the husband's part to pay the amount or deed the land. One judge dissented on the ground that the burden should be thrown on the wife, who got the home place under the will, and not on the husband, and on the further ground that if the burden was to be thrown on the husband, he should be held to be a trustee and not merely subjected to a lien on his land. But clearly it was not a case for declaring a trust, as there was no trust *res*. *Robinson v. Denson*, 3 Head (Tenn.) 395 (1859). The relief given was the only relief theoretically proper, and if the case is to be sustained at all, it is as the reparation of an equitable

prevent the unjust enrichment of the legatee or devisee through his fraudulent retention of the legacy or devise in violation of his promise.⁶⁴ In Massachusetts, at least, it has been intimated by way of *dictum* that a constructive trust will be enforced even though the legacy or devise was expressly "upon a trust which is inconsistent with the secret trust."⁶⁵

tort. Was there such a tort in the absence of an actual fraudulent intent on the part of the husband at the time when, by his conduct, he induced the testator to make the devise to the wife?

⁶⁴ In *O'Hara v. Dudley*, *supra*, 413, 414, Finch, J., for the court, said:

"Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor which equity will not endure. The authorities on this point are numerous. . . . All along the line of discussion [in the authorities] it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the Statute of Frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert* (102 Mass. 40; 3 Am. Rep. 418). It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligations under cover of the statute.'"

Cf. Smith v. Attersoll, 1 Russ. 266 (1826) where the writing signed by the trustees and handed to the testator to evidence the trust was properly recognized as a valid declaration of trust, although it had not been proved as a testamentary paper.

The traditional attitude of courts of equity towards the Statute of Frauds and the Statute of Wills was expressed by Lord Westbury in *McCormick v. Grogan*, *supra*, p. 97, as follows:

"The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner also it deals with the Statute of Wills."

"Fraud" in that passage should be interpreted to cover all unjust enrichment rectifiable in equity.

⁶⁵ *Ham v. Twombly*, *supra*, 172. If the express trust is inconsistent with the secret trust, it would seem that the secret trust must be communicated to the express *cestui que trust* for it to serve as a basis for raising a constructive trust. Unless the conscience of the express *cestui que trust* is charged by a communication to him of the testator's secret trust wishes, his equitable interest, derived under the statute as to wills, cannot properly be taken from him. If his conscience is so charged a construc-

Illegal promises. — If the legacy or devise induced by the promise is for an illegal purpose, as where the intended *cestui que trust* cannot take because of the Statutes of Mortmain, the legatee or devisee cannot keep for himself without being unjustly enriched and by the weight of authority must hold on a constructive trust for the next of kin, residuary legatee, heir, or residuary devisee,⁶⁶ unless the latter is a party to the illegal arrangement.⁶⁷

Where there is active solicitation, fraudulent intent at the time of promising, or a special confidential relationship. — In some jurisdictions it is only where the legatee or devisee is *active* in inducing

tive trust will be raised whether the testator's secret trust wishes were communicated to the express trustee or not.

⁶⁶ *Muckleston v. Brown*, 6 Ves. Jr. 52 (1801); *Strickland v. Aldridge*, 9 Ves. Jr. 516 (1804); *Edwards v. Pike*, 1 Eden 687 (1759); *Springett v. Jennings*, L. R. 10 Eq. Cas. 488 (1870); *Sweeting v. Sweeting*, 10 Jur. N. S. 31 (1864); *O'Hara v. Dudley*, *supra*; *Fairchild v. Edson*, 154 N. Y. 199, 48 N. E. 541 (1897).

Cf. *Gore v. Clarke*, and *Schultz's Appeal*, in n. 56, *ante*.

In *Jones v. Badley*, L. R. 3 Eq. Cas. 635, L. R. 3 Ch. 362 (1876); *Rowbotham v. Dunnett*, L. R. 8 Ch. 430 (1878); and *Flood v. Ryan*, *supra*, no illegal trust was proved.

In *Flood v. Ryan*, *supra*, as there was no secret illegal trust, the fact that the devisee felt in conscience bound to apply the property as if there had been such a trust was deemed not to defeat the devise, since the statute raising the question of illegality applied only to devises to charity where the testator died within thirty days after making the will and did not forbid gifts to charities by devisees under such wills. One justice dissented.

In *Stirk's Estate*, 232 Pa. St. 98, 81 Atl. 187 (1911), the residuary estate was given on a secret trust in fraud of a charitable bequest statute, and the gift was simply declared void for fraud and the residuary estate directed to be distributed under the intestate laws of the state. In *Edson v. Bartow*, *supra*, a trust of part of the residue for the next of kin was declared.

In *Hoffner's Estate*, 161 Pa. St. 331, 343, 29 Atl. 33, 35 (1894), where a gift to a church made in a will executed within thirty days of the testatrix's death was upheld in equity, despite the statute making such gifts void, because it was shown that the gift was made in pursuance of a bequest to testatrix on a promise given by her to leave the legacy to the church, Dean, J., for the court, said:

"This money goes to the church, not by the will, but because there is no valid will, when there ought to have been one; it is a right of the church, for whose benefit the promise was made, to insist on the fulfillment of the obligation in a court of equity in whose hands is the fund and before whom are all parties in interest."

The possible claim of the residuary legatee or devisee is usually overlooked, because in the cases which have arisen the trust has seemingly related to either the whole property of the deceased or else to part or all of the residue as such. The residuary legatee's or devisee's rights are properly safeguarded in the statement from 1 Jarman on Wills, 6 Eng. ed., quoted in n. 92, *post*.

In *Ford v. Dangerfield*, 8 Rich. Eq. 95 (1856), the trust of the residue being illegal and there being no next of kin, the state took "by escheat."

⁶⁷ See *Ham v. Twombly*, *supra*.

the legacy or devise, *i. e.*, coaxes the testator to give it on the assurance that his communicated wishes will be carried out, or intends at the time of the promise or assurance to repudiate it after testator's death, or is in a relation of special trust and confidence towards the testator, that he will be charged as trustee.⁶⁸ The requirement of active solicitation before charging the legatee or devisee as trustee is apparently the adoption of the view that such solicitation constitutes undue influence which will not make the legacy or devise void, but will justify equity in enforcing a trust against the wielder of the undue influence. The same idea seems to be back of the view that if a relation of special trust and confidence exists between the testator and the legatee or devisee, a constructive trust should be enforced.⁶⁹ Indeed, in these cases, as in the fraudulent-intent cases, some jurisdictions seem to proceed on the idea that if there is active solicitation, or breach of confidential relation, or intent at the time of promising not to perform the promise, equity, to prevent fraud, enforces the express oral trust rather than a constructive trust, just as in the part performance of oral contracts for the sale of land cases equity regards itself as enforcing the express oral contract. That equity may en-

⁶⁸ See *Moran v. Moran*, 104 Ia. 216, 73 N. W. 617 (1897); *Evans v. Moore*, 247 Ill. 60, 93 N. E. 118 (1910); *Sprinkle v. Hayworth*, 26 Gratt. (Va.) 384 (1875); *Tenant v. Tennant*, 43 W. Va. 547, 27 S. E. 334 (1897). Cf. *Collins v. Hope*, 20 O. St. 493 (1851), but as to the Ohio rule to-day see *Winder v. Scholey*, *supra*. In *Evans v. Moore*, *supra*, the absence of a fraudulent intent on the part of the promisor at the time of making the promise prevented the enforcement of a trust, but equitable relief was given for other reasons.

⁶⁹ The undue-influence idea is more clearly developed in the deed on oral trust cases than in the will cases. In *Noble v. Noble*, 255 Ill. 629, 635, 99 N. E. 631, 633 (1912), in enforcing a trust because a grantee who took on an oral trust violated a confidential relationship in retaining the property for himself in breach of trust, the court said:

"The term 'fiduciary and confidential relation' is a comprehensive one and [a breach of the relation] exists whenever influence has been acquired and abused or confidence has been reposed and betrayed."

That is almost word for word the language used in *Leonard v. Burtle*, 226 Ill. 422, 431, 80 N. E. 992, 996 (1907), where, in considering whether a will was executed as the result of undue influence, Wilkin, J., for the court, said:

"What constitutes undue influence depends upon the circumstances of each case. To make a good will a person must be a free agent. But all influences are not unlawful. The doctrine of equity, however, concerning undue influence is broad, and it will reach every case and grant relief where influence is acquired and abused and confidence is reposed and betrayed."

force against the legatee or devisee the express oral trust, as such, under any circumstances, would seem to be an indefensible proposition, for the express-trust provisions and the will provisions of the Statute of Frauds and the provisions of subsequent statutes about wills were meant to bind equity judges; but, on the other hand, to say that equity should enforce a constructive trust only if there is active solicitation, a special confidential relation, or actual fraudulent intent at the time of the promise, is unduly to limit the constructive-trust jurisdiction and to give too great encouragement to dishonesty. It is the fact that the legacy or devise was given wholly because of testator's reliance on the legatee's or devisee's promise, and not the solicitation or other activity of the legatee or devisee, that is the important element for equity's consideration prior to the legatee's or devisee's repudiation of promise.⁷⁰ As for a special relation of trust and confidence, what better evidence of one could there be than that the testator, confiding in the promise of the legatee or devisee, made him the gift? Every case of a deed on an oral trust or promise relied on, or of a will on an oral trust or promise relied on, is on principle a case of a relation of special trust and confidence between the grantor and

⁷⁰ Accordingly, in *Benbrook v. Yancy*, *supra*, where the devisee did nothing that was active to induce the devise to her, and yet but for her promise the devise would not have been made, the court enforced a trust, although in the earlier case of *Ragsdale v. Ragsdale*, 68 Miss. 92, 8 So. 315 (1890), stress had been laid on the fact of activity as a constructive-trust element in these will cases.

In *Gilpatrick v. Glidden*, *supra*, 151, Virgin, J., for the court, said:

"Equity does not interfere with the will. That remains unchallenged. Nor does it assume to set aside the Statute of Frauds which the defendants invoke. But on account of her [the devisee's] conduct in procuring the legal title to herself, equity does declare that she cannot conscientiously hold it or its proceeds for her own exclusive benefit. . . .

"We do not mean, however, that it is essential to the upholding of such a trust that a devisee should have been an active agent in procuring the devise to be made in his favor, for the great current of English authority during the last two centuries, as well as that of this country, holds that, if either before or after the making of the will, the testator makes known to the devisee his desire that the property shall be disposed of in a certain legal manner other than that mentioned in the will, and that he relies upon the devisee to carry it into effect; and the latter by any words or acts calculated to, and which he knows do in fact cause the testator to believe that the devisee fully assents thereto and in consequence thereof the devise is made, but after the decease of the testator the devisee refuses to perform his agreement, — equity will decree a trust and convert the devisee into a trustee, whether, when he gave his assent he intended a fraud or not, — the final refusal having the effect of consummating the fraud."

grantee or between the testator and the legatee or devisee.⁷¹ Fraudulent intent at the time of the promise has no bearing on the problem save as showing a legal tort as well as a breach of promise, for the legal tort is not needed to enable equity to act. Equity cares not for mere form, and it should not care whether the unjust enrichment of the defendant through retention of the property in violation of his promise, which properly constitutes an equitable tort,⁷² is aggravated by a legal tort or not. Accordingly, in most jurisdictions, the fraudulent intent at the time feature may be ignored,⁷³ except in so far as the presence of a legal tort enables us to confirm our view that the trust should be enforced in favor of the intended *cestui que trust*.⁷⁴

It would seem, then, that active solicitation of the testator by the legatee or devisee in inducing the devise is not needed to enable equity to declare a trust; that a special relation of trust and confidence other than that constituted by the trust and confidence actually reposed is also not necessary; and that a fraudulent intent

⁷¹ In an anonymous article on "Equity and the Statute of Frauds," in 21 Bench and Bar 61, at p. 65, it is said of conveyances of oral trusts or promises to convey:

"The *confidential relation* has been referred to merely to show the abuse of trust which would result if the defendant were permitted to retain the property. But when one person parts with his property to another on the latter's promise to reconvey, he certainly *trusts* that other or he never would do what he did; and equity, it seems to us, should protect the trust regardless of the exact relations of the parties."

⁷² It is called an equitable tort simply because equity has a different estimate of what constitutes fraud from that entertained by the common-law courts. Similarly we have the phrase "equitable waste" just because equity judges construed the words "without impeachment of waste" in a different way than the law courts did.

⁷³ *McCormick v. Grogan*, *supra* (*semble*); *Curdy v. Berton*, 79 Cal. 420, 21 Pac. 858 (1889) (*semble*); *General Convention v. Smith*, 52 Ind. App. 136, 100 N. E. 384 (1913) (*semble*); *Chapman's Ex'r v. Chapman*, *supra*; *Gilpatrick v. Glidden*, *supra*; *Bailey v. Wood*, 211 Mass. 37, 97 N. E. 902 (1912) (*semble*); *Benbrook v. Yancy*, *supra*; *Smullin v. Wharton*, *supra*; *Yearance v. Powell*, *supra*; *Powell v. Yearance*, *supra*; *Winder v. Scholey*, *supra*; *Blick v. Cockins*, *supra* (*semble*).

But *contra* see cases in note 68, *ante*.

⁷⁴ "If a devisee fraudulently induces the devise to himself, intending to keep the property in disregard of his promise to the testator to convey it or hold it for the benefit of a third person, and then refuses to recognize the claims of the third person, he is guilty of a tort, and equity may and does compel the devisee to make specific reparation for the tort by a conveyance to the intended beneficiary. If, on the other hand, the devisee has acquired the property with the intention of fulfilling his promise, but afterwards decides to break it, relying on the statute as a defense, he commits no tort, but a purely passive breach of contract." Ames, *Lectures in Legal History*, 430-431. See same passage in 20 HARV. L. REV. 549, 554.

at the time of the promise is no more important than fraudulent intent at the time for performance.⁷⁵

Some unsettled questions. — There are some unsettled problems as to what constitutes communication; as, for instance, whether there would be communication if the testator should mail to the legatee or devisee a letter expressing his intentions and die before its receipt, or should hand a letter of instructions to the legatee or devisee and die before it was read; as, for instance, where the testator should instruct the legatee or devisee, who did not know the letter's contents, not to open the letter handed to him until after the testator's death. Probably in neither of the supposititious cases should there be deemed to have been communication.⁷⁶

⁷⁵ "Trust[s], in cases of this character, are impressed on the ground of fraud, actual or constructive, and the basis or ground upon which fraud is imputed is that of holding the estate of the testator against conscience. It is not based necessarily on any imputation of fraud, or intention to defraud, at the time of making the promise, but of afterwards holding or attempting to hold the estate, as if the promise, on which the estate was received in its original condition, had not been made. The fraud consists in holding, or attempting to hold, the estate free from the effect or obligation of a promise, subject to which it was intended to be devised and received and which it is obligatory in conscience to carry out. Where the estate or interest therein is thus received by the person who made the promise, the attempt to hold the estate without performing the promise is an actual fraud, for the reason that the recipient, having actually made the promise, knows personally of the obligation and is guilty of actual fraud in holding, or attempting to hold, the estate without performing the promise, so far as his interest in the estate extends. As to such promisor, it is clearly not a question of modifying or cutting down plain and ambiguous devises in a will, by parol evidence or unattested papers, in violation of the Statute of Frauds or of Wills, for the devise to the promisor is not modified, but he is dealt with as a holder by fraud of property under the will, and a trust *ex maleficio* is raised from these facts." Emery, V. C., in *Powell v. Yearance*, *supra*, 126.

"It is conceded that in cases of actual intentional fraud equity will raise a trust, notwithstanding the Statute of Frauds or the Statute of Wills. In equity what difference can there be whether the fraudulent intention existed at the time the testator acted or not until it was time for the devisee to act? In either case the testator acted upon the faith that the devisee would keep his promise; the result of his refusal or failure to do so is the same in either case and equally fraudulent." Summers, C. J., in *Winder v. Scholey*, *supra*, 216.

Compare *Bailey v. Wood*, *supra*, 43, where Braley, J., for the court, said:

"The transaction may be none the less fraudulent in a court of equity, where the sole heir at law induces the ancestor to die intestate, honestly intending at the time to comply with his requests as to distribution of the estate, but upon receiving the inheritance changes his mind, and in disregard of his express promise deliberately appropriates the property to his own use."

⁷⁶ In *In re Boyes*, *supra*, 536, Kay, J., said:

"If the trust was not declared when the will was made, it is essential, in order to

Another unsettled question is whether information of testator's intentions given in testator's lifetime must be authorized by the testator to be given to the legatee or devisee for the latter to be bound.⁷⁷ The chances are that it will receive a solution similar to that stated in the revocation of offer of contract cases, where, by a

make it binding, that it should be communicated to the devisee or legatee in the testator's lifetime and that he should accept that particular trust. It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared, although he did not know the actual terms of the trust; *McCormick v. Grogan*, L. R. 4 H. L. 82. But the reason is that it must be assumed if he had not so accepted the will would be revoked." Cf. *Morrison v. McFerran*, [1901] 1 Ir. R. 360, where the legatee at testator's request signed a promise to pay legacies without knowing what the contents of the paper were other than that they related to the estate, but later the testator told the legatee about some of the payments which were to be made. The legatee was deemed a trustee as regards those payments only about which the testator told her his wishes.

In *In re Shields*, [1912] 1 Ch. 591, a testator who had provided a legacy of £300 for his housekeeper in his previously executed will drew a check for £300 and wrote a letter to the housekeeper which instructed her to "tell my executors that this is instead of the £300 left you in my will." Without telling the housekeeper what the letter and the check were, the testator, in her presence, sealed them up in an envelope and placed them in a drawer and told her to open the envelope on his death. Later he opened the envelope and took out the check and put the letter in another envelope and told her to keep it and open it on his death. Later he deposited £300 in bank to a joint account in the names of himself and the housekeeper with power to either to draw. On his death the questions arose whether the housekeeper was entitled to the £300 on deposit and whether she was entitled also to the £300 legacy. The court held that the £300 on deposit was the housekeeper's by a good gift *inter vivos*; that the contents of the letter instructing the housekeeper to tell the executors that the £300 was instead of the legacy were not communicated to her; and that in consequence there was no "ademption," *i. e.*, satisfaction, of the legacy, and accordingly she could keep the £300 and yet claim the legacy. The same theory of what constitutes communication should apply in the constructive-trust cases as was applied in this so-called "ademption" case.

⁷⁷ In *Moss v. Cooper*, 1 J. & H. 352, 370, 371 (1861), Vice-Chancellor Sir W. Page Wood said:

"When you prove that the testator desired to create a trust, and that this desire was communicated to the legatee by one who had acted as the testator's agent in the preparation of the will, you have *primâ facie* evidence that the communication was made by the testator's direction. It is not necessary, for the purpose of my decision, to consider what the court ought to do in a case where the testator is proved to have had a particular wish, and that wish is proved to have been communicated to the legatee without the sanction or authority of the testator. That question does not in my opinion arise here, and when it does arise, it may require some consideration, what would be the result if the legatee, after receiving this unauthorized information, abstains from making any communication to the testator as to his acceptance or refusal of the trusts. That will be an entirely new case."

departure from principle, it is said that knowledge of the offerer's inconsistent action in disposing of the offered property to others, even though such knowledge is derived from third persons not authorized to impart it, has the same effect as if those persons were authorized.⁷⁸

Tacit promises.—If what is to be regarded as communication takes place, then a trust will be enforced even though the legatee or devisee did not expressly promise to carry out testator's wishes, but only tacitly did so,⁷⁹ provided a bind-

⁷⁸ *Dickinson v. Dodds*, L. R. 2 Ch. D. 463 (1876); *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 284 (1887); *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134 (1904); *Watters v. Lincoln*, 29 So. Dak. 98, 135 N. W. 712 (1912).

⁷⁹ In *Amherst College v. Ritch*, *supra*, 324, 325, Vann, J., for the court, said:

"While a promise is essential it need not be expressly made, for active coöperation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As was said by this court in the O'Hara case, *supra* [95 N. Y. 403]: 'It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where in such cases the legatee even by silent acquiescence encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise.' . . . As was well said in *Wallgrave v. Tebbis*, *supra* [2 K. & J. 321]:

"'Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of the promise or undertaking, it is in effect a case of trust; . . .'"

See also *Russell v. Jackson*, 10 Hare 204 (1852); *Tee v. Ferris*, 2 K. & J. 357 (1856); *Jones v. Badley*, *supra*; *Springett v. Jennings*, *supra*; *Moss v. Cooper*, *supra*; *Edson v. Bartow*, *supra*; *Stirke's Estate*, *supra*; *Washington's Estate*, *supra*.

In *Mead v. Robertson*, *supra*, where the court refused to find decedent's half-sister and only heir a trustee because, when she was in an adjoining room and may or may not have heard and when neither she nor decedent understood that her consent or refusal was necessary, her husband promised decedent that his wishes would be carried out, the court, by Ellison, J., said that fraud is the base of the action, since the action's object is "to arrest the consummation of a fraud. . . . Therefore since a wilfully broken promise, made in aid of the promisee's definite intention which thwarts such intention and prevents other action, is a fraud, equity affords relief to the bene-

ing obligation to perform was intended and not a mere moral obligation.⁸⁰

Where the legatee or devisee promises the testator to hold for or to pay or convey to others whose names are communicated to him in the testator's lifetime and the express or tacit promise made prevents the revocation or modification of the legacy or devise. — We have seen that, if a legacy or devise is induced by the promise of the legatee or devisee to carry out the testator's wishes expressed in a form not meeting the statutory requirements for wills, but communicated to the legatee or devisee in the testator's lifetime, a constructive trust will be enforced. By the overwhelming weight of authority a trust will be enforced where the original insertion in the will of legacy or devise was not induced by the promise, but where, after the will was executed, the testator communicated to the legatee or devisee his instructions that the latter should hold for the benefit of persons named and received his express or tacit assent to do so, and in reliance thereon refrained from revoking the gift to the legatee or

ficiaries of the promise. There must not only be an expressed intention, but there must be a promise made to carry out such intention; otherwise there would be no breach of promise and consequently no fraud by the promisor." (110 S. W., at p. 1096.) The court admitted that "Proof of a promise on the part of the heir or devisee need not be that it was expressly made. The proof may consist in the silence of the promisor on hearing the declaration of the deceased's intentions" (p. 1097), but it considered that no silence could count as a promise unless speech was expected by the one party or reasonably to be deemed expected by the other. While the court could have put its decision on the ground that the testator would not have made a will anyhow, it put it solely on the ground that no promise was intended to be exacted from and none was actually or tacitly given by the heir. *Cf. Lomax v. Ripley*, 3 Sm. & Giff. 48 (1854).

⁸⁰ In *Amherst College v. Ritch*, *supra*, 323, Vann, J., for the court, said:

"While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still, if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he had made no promise and none has been made in his behalf, takes an absolute title and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him." See *Lomax v. Ripley*, *supra*; *Rowbotham v. Dunnett*, *supra*; *O'Donnell v. Murphy*, 13 Cal. App. 728, 120 Pac. 1076 (1911).

In *Creagh v. Murphy*, Ir. R., 7 Eq. 182 (1873), the testatrix told the legatee her wishes but left what was to be paid by him to any one to his discretion. As he had exercised his discretion by making some payments, it was held that no trust would be enforced. But see *Jones v. Nabbs*, Gilb. Eq. 146 (1718).

devisee.⁸¹ In at least one jurisdiction, however, the line seems to be drawn between inducing a will in one's favor by a promise, which action is there deemed to justify raising a constructive trust,⁸² and preventing by an oral promise the revocation of a legacy or devise, which action is there held not to justify raising a trust.⁸³ Also, in England, where less than all of several, who take

⁸¹ *Reech v. Kennegal*, 1 Ves. 123 (1748); *Barrow v. Greenough*, 3 Ves. Jr. 152 (1769); *Chamberlaine v. Chamberlaine*, 2 Freem. Ch. 34 (1678); *Tee v. Ferris*, *supra*; *Moss v. Cooper*, *supra* (*semble*); *Norris v. Frazer*, L. R. 15 Eq. Cas. 318 (1873); *In re Maddock*, *supra*; *Attorney-General v. Cullen*, 14 Ir. C. L. R. 137 (1863); (*aff'd Cullen v. Attorney-General* L. R. 1 H. L. 190 (1866)); *In re King's Estate*, *supra*; *DeLaurencel v. DeBoom*, 48 Cal. 581 (1874); *Dowd v. Tucker*, 41 Conn. 197 (1874); *Gaither v. Gaither*, 3 Md. Ch. 158 (1851) (*semble*); *Ragsdale v. Ragsdale*, *supra*; *Belknap v. Tillotson*, 82 N. J. Eq. 271, 88 Atl. 841 (1913); *Carver v. Todd*, 48 N. J. Eq. 102, 21 Atl. 943 (1891); *Rutherford v. Carpenter*, 119 N. Y. Supp. 790 (1909); *Hoffner's Estate*, *supra*; *Richardson v. Adams*, 10 Yerg. (Tenn.) 273 (1837); *Brook v. Chappell*, 34 Wis. 405 (1874). *Cf. Wekett v. Raby*, 3 Bro. Parl. Cas. 16 (1724); *Van Houten v. Stevenson*, 74 N. J. Eq. 1, 77 Atl. 612 (1907); *Sims v. Walker*, 8 Humph. (Tenn.) 503 (1847).

For cases where it is not clear whether the promise was before or after the making of the will, see *Nab v. Nab*, *supra*; *Oldham v. Litchfield*, *supra*; *French v. French*, *supra*; *Shields v. McAuley*, *supra*; *Hughes v. Bent*, *supra*; *McAuley's Estate*, *supra*; *Washington's Estate*, *supra*.

In *French v. French*, *supra*, 230, Lord Davey in his concurring opinion said:

"My Lords, it is said that this jurisdiction is based upon fraud, and so it is because if you once get to this, that it is a trust which is imposed upon the conscience of the legatee, then if the legatee betrays the confidence in reliance upon which the bequest was made to him, then it is what I should think everybody would consider a fraud, though I take the liberty to say that the moral turpitude of any particular case must vary infinitely according to the circumstances of the particular case. My Lords, the basis of it is, of course, that the testator has died, leaving the property by his will in a particular manner, on the faith and reliance upon an express or implied promise by the legatee to fulfill his wishes, and your Lordships will at once see that it makes no difference whatever whether the will be made before the communication to the legatee or afterwards, because, as was said, I think by Vice-Chancellor Turner, in one of the cases which were cited, the presumption is that the testator would have revoked his will and made another disposition if he had not relied upon the promise, express or implied, made by the legatee to fulfill his wishes."

⁸² *Blick v. Cockins*, *supra*. *Cf. Miller v. Cockins*, 239 Pa. St. 538 (1913).

⁸³ *Fox v. Fox*, 88 Pa. St. 19 (1878); *McCloskey v. McCloskey*, 205 Pa. St. 491, 55 Atl. 180 (1903). In *McCloskey v. McCloskey*, *supra*, a father, after making his will in favor of his wife for life and after her death for his daughters, told the daughters that they were to hold for themselves and their three brothers equally, and they agreed to do so. After the father's death the daughters refused to perform, and it was held that their refusal to perform was not such misconduct as to raise a trust. *Brown, J.*, for the court, said (p. 496):

"Where an absolute devise is procured through the promise of a devisee that he will hold it for such uses and purposes or for such beneficiaries as the testator may desig-

under the will as joint tenants, induced the making of the will by an oral promise, all will be bound by a constructive trust; but if the promisors simply prevented by their promise the revocation of a will previously made, only those who gave the promise will be bound by a trust.⁸⁴ It is admittedly illogical to draw such a line.⁸⁵

In the case of a promise which prevents the revocation of a legacy or devise, the same difference of opinion would seem to exist as to the necessity of solicitation, of confidential relationship, and of fraudulent intent at the time of promising, as applies in the case of a promise which induces the legacy or devise.⁸⁶ In the case of an illegal promise, also, the same rule applies in both situations.⁸⁷

Where the heir or next of kin promises the ancestor to hold for or to pay or convey to others whose names are communicated to him in the ancestor's lifetime and the promise is made to secure intestacy in whole or in part. — If the making of a will is prevented, or the revocation of a will is secured, and the intending testator is persuaded to die intestate as to the property he intended to will, by the promise of the heir or next of kin to carry out his wishes, a constructive trust will be enforced against the heir or next of kin who so promised and against any transferee of his who is not an innocent purchaser for value.⁸⁸ No case seems to have drawn the line

nate, the breaking of the promise, without which the devise would not have been made, is bad faith to the testator. . . . But unkept promises, declarations, or misrepresentations, which will create trustees *ex maleficio*, must be made before or at the time the legal title is acquired or the devise made; for nothing subsequently said by a grantee or devisee will turn an estate that had passed absolutely from the grantor or testator into a trust for others."

The court apparently thought that the devise took effect on the making of the will. In other words, it would seem to be because the court overlooked the very elementary fact that a will is ambulatory, *i. e.*, that the legal title does not pass until the testator's death, that it decided as it did.

⁸⁴ See *In re Stead*, [1900] 1 Ch. 237.

⁸⁵ *Ibid.*, per Farwell, J., quoted *post*, p. 387.

⁸⁶ That fraudulent intent at the time of promising is not required see *In re Maddock*, *supra*; *French v. French*, *supra*; *DeLaurencel v. DeBoom*, *supra*; *Hoffner's Estate*, *supra* (*semble*).

But, *contra*, see *McCloskey v. McCloskey*, *supra* (*semble*).

⁸⁷ But see *Burney v. Macdonald*, 15 Sim. 6 (1845).

⁸⁸ *Cassey v. Fitton*, 2 Harg. Jur. Arg. 296 (1679); *cf.* 1 Ames, Cases Eq. Jur. 145; *Harris v. Horwell*, Gilb. Eq. 11 (1708); *McDowell v. McDowell*, 141 Ia. 286, 119 N. W. 702 (1909) (estoppel); *Gemmel v. Fletcher*, 76 Kan. 577, 92 Pac. 713 (1907); *Browne v. Browne*, 1 Harr. & Johns. (Md.) 430 (1803); *Bailey v. Wood*, *supra* (*semble*). But see *Campbell v. Brown*, 129 Mass. 23 (1880); *Grant v. Bradstreet*, 87 Me. 583, 33 Atl.

between prevention of the making of a will or of a particular legacy or devise and inducing the revocation of a will or of a particular legacy or devise, but the same difference of opinion exists here as in the other situations discussed above as to the necessity of solicitation, confidential relationship, or fraudulent intent at the time of promising.⁸⁹ In practically every case of this particular kind, however, there will probably be found to have been active solicitation.

Where the will discloses that the legatee or devisee is to hold in trust, but does not disclose the terms. — In the legacy or devise cases on oral trust discussed so far, the will did not disclose the fact that there was any trust. There are, however, cases where the will discloses that the legatee or devisee is to dispose of the property according to instruction already communicated, or thereafter to be communicated, to him by the testator. If in such case the instructions are not made known to the legatee or devisee, he must hold in trust for some one, and the only one is the next of kin, residuary

165 (1895); *Norton v. Mallory*, 63 N. Y. 434 (1875); *Tyler v. Stitt*, 132 Wis. 656, 112 N. W. 1091 (1907). See *Sellack v. Harris*, 2 Eq. Cas. Abr. 46, pl. 11, 5 Vin. Abr. 521, pl. 31 (1708), where a resulting trustee notified his heir of the trust and got his promise to perform it, but where, of course, the promise was not needed, and *Bulkley v. Wilford*, 2 Cl. & F. 102 (1834), where there was no promise, but where the heir was seeking to profit by the revocation of a will as to all of testator's lands unnecessarily, and seemingly unknown to the testator, caused by a fine being levied of all the land on advice given by the heir as the testator's solicitor when only part of the land was to be transferred. In both cases a trust was enforced. Cf. *Ransdel v. Moore*, *supra*, where the giving of a deed by a dying grantor was prevented by the promise and the will-case rule was applied, and *Scott v. Harris*, 113 Ill. 447 (1885), where a husband conveyed to his wife to hold and manage property and apply the estate according to the husband's then existing will, but the grantor was not dying and no constructive trust was enforced.

In *Browne v. Browne*, *supra*, unlike the usual case, there was a bilateral contract.

In *Bedilian v. Seaton*, 3 Wall. Jr. 279 (1860), it was not shown that a will would have been made if the promise had not been given. In *Campbell v. Brown*, *supra*, no promise by the heir seems to have been shown, and if there was one, it was not the promise but the sudden decease of the intestate that prevented the making of a will embodying his wishes. Cf. *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (1901).

⁸⁹ That fraudulent intent at the time of making the promise need not be shown, see *McDowell v. McDowell*, *supra* (estoppel); *Gemmel v. Fletcher*, *supra*; *Grant v. Bradstreet*, *supra*; *Bailey v. Wood*, *supra*; *Mead v. Robertson*, *supra* (seemingly); *Norton v. Mallory*, *supra* (seemingly).

But see, *contra*, *Cassels v. Finn*, 122 Ga. 33, 49 S. E. 749 (1905); *Bedilian v. Seaton*, *supra* (seemingly).

It is difficult to appraise *Tyler v. Stitt*, *supra*.

legatee, heir, or residuary devisee.⁹⁰ If, however, the instructions are communicated to the legatee or devisee by the testator in his lifetime, then the legatee or devisee should be made to hold on a constructive trust for the intended *cestui que trust*. There is, however, a conflict of authority on the point.⁹¹ The jurisdictions which

⁹⁰ *Juniper v. Batchelor*, *supra*; Ames, Cases on Trusts, 2 ed., 189; *In re Boyes*, *supra*; *Scott v. Brownrigg*, *supra*; *Bryan v. Bigelow*, 77 Conn. 604, 60 Atl. 266 (1905); *Thayer v. Wellington*, 9 Allen (Mass.) 283 (1864); *Gross v. Moore*, 22 N. Y. Supp. 1019 (1893). Cf. *Briggs v. Penny*, 3 De G. & Sm. 525 (1849); *In re Keenan*, 94 N. Y. Supp. 1099 (1905).

In *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662, 672-3, Eve, J., in the lower court, expressed a doubt as to the need, on principle, of a communication to the trustee in such a case, if only a communication, "properly proved," was made to some one. He said: "Where there is nothing in the will disclosing any trust, one can appreciate why communication of the trust to and its acceptance by the legatee is essential, but the considerations applicable to a case where the legatee takes beneficially under the will, and is only converted into a trustee by reason of the trust being disclosed to and accepted by him, do not, I should have thought, in any way apply to a case where it is made clear on the face of the will that he is to take as trustee and not beneficially. In the last mentioned cases the problem is to find out what is the trust, not whether there is a trust at all, and speaking for myself, I do not see why a communication to the trustee should be an essential element in the solution of the problem, or, indeed, of any greater value than a communication made to any other person, and of course properly proved. But *In re Fleetwood*, 15 Ch. D. 594, and the other authorities appear to have established that there must be a communication to the trustee and I must accept that position." See n. 62, *ante*.

⁹¹ That on a bequest or devise, expressly made to carry out the unattested directions of the testator communicated in his lifetime to the legatee or devisee, the legatee or devisee must hold for the intended *cestui que trust*, see *In re Huxtable*, [1902] 2 Ch. 793; *Pring v. Pring*, 2 Vern. 98 (1689); *Irvine v. Sullivan*, L. R. 8 Eq. 673 (1869); *In re Spencer's Will*, 57 L. T. R. 519 (1887); *In re Fleetwood*, *supra*; *Riordan v. Banon*, 10 Ir. Eq. R. 469 (1876); *Attorney-General v. Dillon*, 13 Ir. Ch. Rep. 127 (1862); *Attorney-General v. Cullen*, *supra* (*semble*), *aff'd Cullen v. Attorney-General*, *supra*; *Morrison v. McFerran*, [1901] 1 Ir. R. 360; *In re King's Estate*, *supra* (*semble*); *Curdy v. Berton*, *supra*; *Jay v. Lee*, 41 N. Y. Misc. 13, 83 N. Y. Supp. 579 (1903); *Golland v. Golland*, *supra* (*semble*); *Williams's Appeal*, 73 Pa. St. 249 (1873) (*semble*). See also *Cagney v. O'Brien*, 83 Ill. 72 (1876), where executors who took under oral instructions mentioned in the will, and who carried them out, were protected. Cf. also *In the Goods of Marchant*, [1893] P. 284; *Podmore v. Gunning*, *supra*; *Smith v. Attersoll*, 1 Russ. 266 (1826); and *O'Brien v. Condon*, *supra*. But see *Balfe v. Halpenny*, [1904] 1 Ir. R. 486, where the trust was not enforced for the *cestuis que trust* whom the testator told one of the trustees about, after the will was executed, but for the next of kin, and *Johnson v. Ball*, 5 De G. & Sm. 85 (1851) where a trust was enforced for residuary legatees although the testator's wishes were communicated to both trustees. And cf. *Creagh v. Murphy*, Ir. R., 7 Eq. 182 (1873).

That the legatee or devisee cannot safely perform to the intended *cestui que trust*, but must instead hold for the next of kin, residuary legatee, heir, or residuary devisee, see *Balfe v. Halpenny*, *supra*; *Bryan v. Bigelow*, *supra*; *Olliffe v. Wells*, *supra*; *Wilcox v.*

make the legatee or devisee hold as if the terms of the trust had not been communicated, proceed on an erroneous theory of what happens in the latter case. That erroneous theory is that, when a legacy or devise is expressly "in trust," but the trusts are not expressly specified, the equitable interest never passes out of the testator by the will, and so goes as in case of intestacy.⁹² That

Attorney-General, 207 Mass. 198, 93 N. E. 599 (1911); *Smith v. Smith*, 54 N. J. Eq. 1, 32 Atl. 1069 (1895); *In re Keenan*, *supra* (semble). But see *Golland v. Golland*, *supra* (semble contra); *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382 (1892); *Sims v. Sims*, 94 Va. 580, 27 S. E. 436 (1897). Cf. *Davison v. Wyman*, 214 Mass. 192, 100 N. E. 1105 (1913). In *Smith v. Smith*, *supra*, the court followed *Olliffe v. Wells*, *supra*, although the will showed that the trust was for charity. *Wilcox v. Attorney-General*, *supra*, is in accord. *In re Huxtable*, *supra*, is the charity case contra to *Smith v. Smith* and *Wilcox v. Attorney-General*, *supra*.

But even where a trust will be enforced the doctrine is not applied to powers of appointment to be exercised according to secret instructions. *In re Hetley*, [1902] 2 Ch. 866; *Reid v. Atkinson*, Ir. R. 5 Eq. 373 (1871) (semble).

While in *In re Huxtable*, *supra*, evidence was admitted to show what the charitable purposes agreed upon between the testator and the legatee as mentioned in the will were, it was held not admissible to show that only the interest of the £4000 bequeathed was to be used for charitable purposes by the legatee, who was to dispose of the principal at his death as his own. In concurring in holding that the bequest of £4000 "for the charitable purposes agreed upon between us" could not be cut down in that way without contradicting the will, *Stirling, L. J.*, in his separate opinion, said (p. 797):

"If, for instance, the affidavit [of the legatee] had stated that a conversation had taken place with reference to a legacy of £2000, and that by her will the testatrix had bequeathed £4000 for the charitable purposes, it could never, as it seems to me, be contended that the amount of the legacy was to be cut down and that the charities were to have only £2000, because the conversation related to £2000, whereas by her will the testatrix expressly said that £4000 was to be applied to the charitable purposes. In like manner it appears to me that, when the will says that the capital sum of £4000 is to be applied to the charitable purposes, it is not competent for the court to look at the evidence for the purpose of cutting down the gift to the income of £4000 during the life of [the legatee] Mr. Crawford."

⁹² In *Olliffe v. Wells*, *supra*, 225, 226, *Gray, C. J.*, for the court, said:

"Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. *Cullen v. Attorney-General*, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the *cestuis que trust*; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. *Boson v. Statham*, 1 Eden 508; cf. 1 Cox Ch. 16; *Russell v. Jackson*, 10 Hare 204; *Wallgrave v. Tebbis*, 2 K. & J. 313.

"Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no bene-

theory is erroneous, because it assumes that the testator dies possessed of two separate interests in the property, *viz.*, a legal in-

ficial interest; and as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See Lewin on Trusts, 3 ed., 75."

The weakness of the foregoing analysis is pointed out in the text, but here should be noted the court's failure by proper language to preserve the rights of residuary legatees or devisees where the trust is not of part or all of the residue. That the residuary legatee or devisee may have rights if the trust cannot take effect is clear. As is said in 1 Jarman on Wills, 6 Eng. ed., 909-910:

"Where the fact that a gift to A. is made to him merely as trustee appears on the face of the will, he cannot in any case take beneficially, and if the trust is not established, or is illegal, or fails, he holds upon trust for the residuary legatee (or devisee) or the next of kin (or heir at law) as the case may be. This is so even if it appears from the evidence that, subject to the trusts which fail, the testator intended the trustee to take the property for his own benefit. *Re Baillie*, 2 T. L. R. 660."

Massachusetts adheres to the rule of *Olliffe v. Wells* even in the case of a trust for charity where the charitable objects to be selected can be ascertained only upon resort to the verbal communications of the testator to the trustee. *Wilcox v. Attorney-General*, *supra*. Cf. *Thayer v. Wellington*, *supra*.

What the Massachusetts rule would be if the language in the will should be deemed not to disclose a trust as intended, but instead, in addition to failing to set forth any terms of trust, should be determined to be merely precatory, and if, nevertheless, there was an oral-trust understanding between the testator and the legatee or devisee, is not so clear. Probably, however, the oral trust would be used as the basis for a constructive trust. See *Ham v. Twombly*, *supra*. The supposititious case could hardly arise, however, because the practical effect of the court's knowledge that there was a trust intended would probably be that it would interpret the precatory language to be trust language, and therefore deny the intended *cestui que trust* any relief. In *Golland v. Golland*, *supra*, precatory language in the will was not allowed to interfere with the enforcement of a constructive trust in favor of the intended *cestui que trust* of the oral trust (see also *Crook v. Brooking*, 2 Vern. 50 (1688); *Edson v. Bartow*, *supra*), and that should be the rule even in Massachusetts, since the reasons given for the decision in *Olliffe v. Wells*, *supra*, do not apply if the language in the will is only precatory.

It should be noted that *Olliffe v. Wells*, *supra*, and *Wilcox v. Attorney-General*, *supra*, apply only when the will declares that there is a trust, but not what the trust is. Where the will expresses the trust in sufficient terms, but the testator arranged a secret

terest and an equitable, whereas he could have and did have only one. Our law of merger of estates and of other interests of itself makes that true.⁹³ What happens on a devise expressly "in trust," but on trusts not expressed, is that on testator's death all his interest passes under the will, and then equity imposes a trust because of the clear expression of intention that the legatee or devisee should not keep beneficially. That trust is not an express trust in writing, — the words "in trust" or equivalent words in the will simply negative any presumption that the devisee is to take beneficially, — and in so far as the devisee seeks to keep for himself it is in no sense express but is wholly constructive.⁹⁴ Accordingly equity can and should select the *cestui que trust* for this constructive trust *cy pres* the testator's intentions and in harmony with the devisee's promise. Where the devisee does not try to keep for himself, but stands indifferent and compels chancery to tell him for whom to hold, the same conclusion would seem to be sound. Where, however, the devisee does not try to keep the property devised, and is not indifferent, but instead seeks to carry out the testator's wishes, chancery does not have to enforce any trust whatever. It should not interfere with the carrying out of the express oral or otherwise unattested trust, because there is no express written trust in conflict with it to suggest such action, even if such an express written trust would justify such interference,⁹⁵ and because there is no unjust enrichment to be rectified by the creation and enforcement of a constructive trust. The case where a legacy or devise is expressly "in trust," but the terms of the trust and the names of the intended beneficiaries are not found in the will, but were communicated by the testator to the legatee or devisee, should be decided exactly the same way as the case where

trust inconsistent with the express trust, a Massachusetts *dictum* suggests that the secret trust will be made the basis of a constructive trust. *Ham v. Twombly, supra*. To deprive the express *cestuis que trust* of their interests because of a secret oral arrangement between their express trustee and the testator, of which they learn only after the testator's death, would seem, however, to be wrong.

⁹³ If, as the writer believes, an equitable interest is a right *in personam*, that fact is an additional reason for asserting that the property right of one who owns in severalty the fee simple in realty, or the absolute interest in personalty, is not split up into a legal interest and an equitable one. See Ames' *Lectures on Legal History*, pp. 288-289. See same passage in 5 HARV. L. REV. at pp. 392-393.

⁹⁴ See 12 Mich. Law Rev. 518, n.

⁹⁵ Cf. n. 65, *ante*, and the text to which it belongs.

the legacy or devise is absolute on its face and the same communication took place.

Occasionally on a fair construction of a will the legacy or devise is found not to be wholly for trust purposes, but is, instead, a gift of property subject to a trust not fully disclosed by the will; and in such case the legatee or devisee takes the part of the legacy or devise not needed for the carrying out of the trust.⁹⁶ That is of course the usual disposition of the property where there are secret trusts not referred to in the will itself.

Promises by less than all who take as tenants in common or joint tenants. — So far we have been considering the case of a promise made by a sole legatee or devisee. The case of a promise or promises made by all of joint legatees or devisees is, of course, the same in principle.⁹⁷ But the case of a joint legacy or a joint devise given on a promise made by less than all has led to some differences of opinion. That those who promise will be deemed constructive trustees whenever they would have been if they had been sole legatees or devisees is clear,⁹⁸ and no doubt chancery would not permit the death of the promisors, in the case of joint tenancy where less than all promise, to defeat the trust, even though to enforce the trust against the survivors would operate *pro tanto* to depreciate the right of survivorship in the case of joint tenancy. But should those who did not promise be bound by a constructive trust? The question is far from easy and the answers given by the courts are conflicting. The English answer is given and English authorities collected in Farwell, J.'s, opinion in *In re Stead*,⁹⁹ as follows:

"The authorities establish the following propositions:

"If A. induces B. either to make or to abstain from revoking a will leaving him property by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the court will hold this to be a trust and will compel A. to execute it. See *McCormick v. Grogan*, L. R. 4 H. L. 82, 89 (1869). . . .

"If A. induces B. either to make, or to leave unrevoked, a will leaving

⁹⁶ *Irvine v. Sullivan*, [1869] L. R. 8 Eq. 673; *Wood v. Cox*, 2 Myl. & Cr. 684 (1837). Cf. *In re West*, [1900] 1 Ch. 84.

⁹⁷ In *Gray v. Gray*, 11 Ir. Ch. 218 (1860) the testator told his wishes to one of the two joint legatees and devisees before the will was executed and to the other after it was executed, and a trust was enforced against both.

⁹⁸ *Yearance v. Powell*, *supra*.

⁹⁹ *Supra*.

property to A. and C. as tenants in common, by expressly promising or tacitly consenting that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after B.'s death, A. is bound, but C. is not bound: *Tee v. Ferris*, 2 K. & J. 357; the reason stated (*Ibid.* 368) being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust.

"If, however, the gifts were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C.: *Russell v. Jackson*, 10 Hare 204; *Jones v. Badley*, L. R. 3 Ch. 362, the reason stated being that no person can claim an interest under a fraud committed by another: in the latter case A. and not C. is bound: *Burney v. Macdonald*, 15 Sim. 6, and *Moss v. Cooper*, 1 J. & H. 352, the reason stated (1 J. & H. 367) being that the gift is not tainted with any fraud in procuring the execution of the will.

"Personally I am unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes, but apparently a distinction has been made by the various judges who have had to consider the question. I am bound, therefore, to decide in accordance with these authorities and accordingly I hold that the defendant Mrs. Andrew [the one of two joint tenants to whom the terms of the trust, if any, were not disclosed] is not bound by any trust [since the terms of the trust were communicated to the other joint tenant after the making of the will]." ¹⁰⁰

¹⁰⁰ Cf. *Rowbotham v. Dunnett*, *supra*; *In re King's Estate*, *supra*; *Geddis v. Semple*, [1903] 1 Ir. R. 73. In *Russell v. Jackson*, *supra*, the will gave the residue to two on a promise by one to the knowledge of the others, who did not dissent in testator's lifetime. That was in effect a promise by both. Cf. *Springett v. Jenings*, *supra*.

In *Turner v. Attorney-General*, 10 Ir. Eq. 386 (1876) an admission of trust in the will of one joint tenant was held not binding on the surviving joint tenants. Whether the joint tenant making the admission talked to the testator before or after making his will, or even if he ever talked to him about his wishes, did not appear.

In *In re Gardom*, *Le Page v. Attorney-General*, [1914] 1 Ch. 662, the Court of Appeal found that there was no communication of a secret trust. Eve, J., in the court below, thought that both before and after the will was made there was communication of a secret trust to one of two trustees under a gift of the residue to the trustees to be expended "in such manner as they know to be most in agreement with my desires." As trustees take as joint tenants, Eve, J., on his theory of the evidence, was fully justified under the English cases in enforcing a constructive trust on a communication of the secret trust prior to the making of the will to one of two trustees and on a tacit assumption of the secret trust by that one.

Few American cases have faced the joint-tenancy problem because in American jurisdictions, by statute in the case of realty and statute or judicial legislation in the case of personalty, gifts by deed or will to two or more are presumed to create tenancy in common, in the absence of express words of joint tenancy. It would be a very unusual will that would give on oral trust to two or more expressly directed to take as joint tenants, and would not also expressly state the trusts on which they were to take.¹⁰¹

With reference to tenancy in common there is a very decided difference of opinion. In *Powell v. Yearance*¹⁰² it is held that the unauthorized promise of one tenant in common to carry out testator's wishes, made to the testator in the absence of the others, to induce the testator to sign a prepared will without waiting for changes, could not be made the basis of a constructive trust against the others who did not learn of the promise until after the testator's death.¹⁰³ In that case Emery, V. C., said:

"It is considered that to give effect to such assurances [by one tenant in common for others] would contravene the Statute of Wills and would entitle one beneficiary to deprive the rest of their benefits by setting up a secret trust."¹⁰⁴

On the other hand, in *Hooker v. Axford*,¹⁰⁵ in *Amherst College v. Ritch*,¹⁰⁶ and in *Winder v. Scholey*,¹⁰⁷ it was held that where the promise was made by one for all, and was the sole inducing cause of the gift to them, those who did not promise could not take without ratifying the promise made in their behalf and therefore could not retain in repudiation of the promise without being unjustly enriched.

In *Hooker v. Axford*¹⁰⁸ an attorney advised a wife to devise her property absolutely to him and to her nephew on the oral promise of the attorney that they would hold for the testatrix's husband. She did so and died, and the attorney and the nephew repudiated

¹⁰¹ In *Powell v. Yearance*, *supra*, 127, Emery, V. C., pointed out that the case before the court was one of tenancy in common and not of joint tenancy. In *Winder v. Scholey*, *supra*, 225, Summers, C. J., said that "There is no joint tenancy in this state and the distinction made in the English cases cannot be made here." The case of *O'Hara v. Dudley*, *supra*, however, was a case of devise to joint tenants on an oral trust.

¹⁰² *Supra*.

¹⁰³ See also *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233 (1907).

¹⁰⁴ *Supra*, 127. ¹⁰⁵ *Supra*. ¹⁰⁶ *Supra*. ¹⁰⁷ *Supra*. ¹⁰⁸ *Supra*.

the trust. In enforcing a trust for the husband, Cooley, C. J., said for the court:

"The will, then, must be regarded as made as it was because Crocker, who was an attorney at law, advised that it should be. If he had given the advice intending to appropriate the property, this would have been a gross fraud and a gross breach of confidence. It would be equally a fraud if, having given the advice honestly, he should afterwards conclude dishonestly to retain the lands. And this being his position, the party who, under his advice is associated with him, is in the like position. It would be a fraud in Axford to appropriate that which only by the advice of Crocker, given for another person's benefit, is brought within his reach. The fraud on Mrs. Hooker's estate would be exactly the same, whether one or the other of the nominal beneficiaries repudiates the trust.¹⁰⁹

In *Amherst College v. Ritch*,¹¹⁰ where the gift in the will was to Mr. Ritch, Mr. Vaughan, and Mr. Bulkley, but on an oral agreement whereby Mr. Ritch and Mr. Vaughan for themselves and for Mr. Bulkley, but without authority from him, promised the testator to hold for certain purposes, Vann, J., for the court, said:

"As the gift was to them as tenants in common, a promise that bound all was necessary in order to include each of the three shares. That Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters, and statements to the testator, that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee the question would be more serious, but he was not. The trial court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The General Term, in its opinion, went farther and declared that there was an understanding between Mr. Bulkley and the testator to the same effect, but the evidence to sustain this conclusion is meagre, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his co-tenants in making the promise for him, as that would be a fraud. He was not a purchaser; he furnished no consideration; there was no contract for his benefit; he was

¹⁰⁹ *Id.*, pp. 456, 457.

¹¹⁰ *Supra.*

in the attitude of accepting a gift pure and simple, but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise and fairly take that which came to him solely on account of the promise, even if it was not made or authorized by him? We think not, because his title came through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift or accept the responsibility. While the cases are not uniform, the weight of the authority sustains this conclusion."¹¹¹

In *Winder v. Scholey*¹¹² the reasoning of the New York court in *Amherst College v. Ritch* was adopted. But, for that reasoning to apply, the promise made by one tenant in common must not be for himself alone. If it is, he alone will be deemed a trustee because of the retention of the property in breach of that promise.¹¹³

The policy of enforcing constructive trusts where a legacy or devise or intestate succession is secured by oral promises which are broken. — In concluding this discussion of bequests, devises, and intestacies obtained on oral promises, a word should be said about the wisdom of enforcing constructive trusts in such cases. In *Bedilian v. Seaton*,¹¹⁴ where there seems to have been good ground to refuse to

¹¹¹ *Id.*, pp. 327-328. In *Edson v. Bartow*, *supra*, 221, the court said of *Amherst College v. Ritch*, *supra*, that "we held that Bulkley by accepting the gift ratified the promise made in his name." A late case following these cases is *Golland v. Golland*, *supra*.

¹¹² *Supra*.

¹¹³ *Edson v. Bartow*, *supra*. In *Simons v. Bedell*, 122 Cal. 341, 55 Pac. 3 (1898) a trust was enforced against the heirs of the intestate under rather unusual circumstances. During the last illness of intestate, her father persuaded her to deed a piece of land in New York to her mother and not to make a will disposing of a piece of land in Los Angeles, by a promise that if she would deed the New York piece to the mother, then the father and mother, who with intestate's husband were her sole heirs at law, would convey the Los Angeles piece to the intestate's husband. The court held that while the father was not the agent of the mother in making the promise, the mother could not keep the New York property deeded to her except on the condition stated by the grantor. The court intimated that the mother could keep the interest in the Los Angeles property which intestate intended that she should convey to intestate's husband (or rather its proceeds, for it had been sold by order of court), if she chose to give up the New York property to the estate of intestate, saying: "Equity and good conscience demand that the defendants Bedell either convey the New York property to the estate of [intestate] Jennie Simons, deceased, or relinquish all claim upon the proceeds of the Los Angeles property." (p. 348). The opinion, — one by a Supreme Court Commissioner, — is inadequate, but the decision presents the interesting problem of a promise by one of two out of three prospective tenants in common, — here as heirs at law, — made for the second without authority and in favor of the third.

¹¹⁴ *Supra*.

enforce a constructive trust, as there was nothing to show that intestacy was induced by the promise, Grier, J., expressed his dislike of the doctrine that constructive trusts will be enforced for retention of legacies or devises or intestate succession in breach of oral promises in the following language (p. 287):

"After forty years' experience at the bar and on the bench, I must say that I think courts had better never have relaxed the stringent rule of these statutes [of frauds, wills, and descents]. Courts, as well as juries, are too apt to be led away by the cry of 'Fraud'! We all hate fraud and are too willing to assume the functions of an overruling Providence and punish it by arbitrary power. This feeling of virtuous self-complacency too often leads to hasty decisions and dangerous precedents. I have known a valuable property converted into a trust by the testimony of an old woman who recollected and construed a *nod*, after some twenty-two years, into the acknowledgment of a trust. See *Jones v. McKee*, 3 Barr (Pa.) 496."

No doubt there are occasional miscarriages of justice under the constructive-trust doctrine, but they are far fewer than would take place if fraudulent retention were not remedied under that doctrine. When it is remembered that no promise will be regarded that does not call unquestionably for performance,¹¹⁵ that failure to perform the promise must be clearly shown,¹¹⁶ and that the court must be satisfied that the testator or intestate relied on the promise,¹¹⁷ there seems to be no occasion to fear that any appreciable number of constructive trusts have been raised, or will be raised unwarrantably.¹¹⁸

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¹¹⁵ See *Orth v. Orth*, *supra*; *Allman v. Pigg*, 82 Ill. 149 (1876).

¹¹⁶ *Sparks v. De La Guerra*, 14 Cal. 108 (1859).

¹¹⁷ *Whitehouse v. Bolster*, 95 Me. 458, 50 Atl. 240 (1901); *Tyler v. Stitt*, *supra*. Cf. *Campbell v. Brown*, *supra*; *Mead v. Robertson*, *supra*. But, doubtless, where the express or tacit promise is clearly proved, there is a *prima facie* presumption that the testator would not have made the will or would have revoked or modified it, or that the intestate would have made a will, but for the promise. See *DeLaurencel v. DeBoom*, *supra*, 586.

¹¹⁸ That the evidence must be clear, cogent, and convincing is the accepted rule in this class of cases. *Grant v. Bradstreet*, *supra*; *Stone v. Manning*, 103 Tenn. 232, 52 S. W. 990 (1899).

ADDENDUM

Through the oversight of the writer a note intended for the end of the sentence just before n. 10 on page 241, *ante*, was misplaced until too late for its insertion there. It seems worth while to insert it here even though it consists mainly of a quotation.

In *Krell v. Codman*, 154 Mass. 454, 28 N. E. 578 (1890-1891), a voluntary covenant to pay a sum of money six months after the death of the covenantor was enforced against the executors of the covenantor despite their objection that it was in effect a will. In passing on the question, Mr. Justice Holmes said:

"The truth is that the policy of the law requiring three witnesses to a will has little application to a contract. A will is an ambulatory instrument, the contents of which are not necessarily communicated to any one before the testator's death. It is this fact which makes witnesses peculiarly necessary to establish that the document offered for probate was executed by the testator as a final disposition for his property, but a contract which is put into the hands of the adverse party and from which the contractor cannot withdraw stands differently. See *Perry v. Cross*, 132 Mass. 454, 456, 457. The moment it is admitted that some contracts which are to be performed after the testator's death are valid without three witnesses a distinction based on the presence or absence of a valuable consideration becomes impossible with reference to the objection which we are considering. A formal instrument like the present, drawn up by lawyers and executed in the most solemn form known to the law is less likely to be a vehicle for fraud than a parol contract based on a technical detriment to the promisee."